No. 72-844

In the Supreme Court of the United States

OCTOBER TERM, 1972

E. E. FALK, ET AL., PETITIONERS

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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MEMORANDUM FOR THE RESPONDENT

The petition seeks review of the judgment of the court of appeals rendered in this case on September 11, 1972, upholding the award of pre-judgment interest on back pay awards under Section 17 of the Fair Labor Standards Act. Petitioners also seek to raise three questions of statutory construction (Questions 1-3, Pet. 3) identical to questions presented in an earlier petition for a writ of certiorari in this case, which was denied on October 12, 1971. *Falk* v. *Hodgson*, 404 U.S. 827 (No. 70-225).

Certiorari was opposed by the Secretary of Labor

in No. 70-225 on two of the three issues there presented (Questions 2 and 3 of the present petition). See Memorandum for Respondent in No. 70-225. Since, however, the holding of the court of appeals on the remaining issue (Question 1) presented a conflict with the holding of the Third Circuit in *Hodgson* v. *Arnheim and Neeley, Inc.*, 444 F.2d 609, as to the proper construction of Section 3(r) of the Act, the Secretary stated that he would not oppose the granting of the petition for certiorari limited to that single issue, if the conflict were not resolved by the Secretary's petition for rehearing then pending before the Third Circuit in the *Arnheim* case. Although rehearing was denied in the *Arnheim* case, so that the conflict was not resolved, certiorari was nonetheless denied in the *Falk* case. The Secretary of Labor thereafter petitioned for a writ of certiorari in the *Arnheim* case, and the petition was granted on October 10, 1972 (No. 71-1598). Oral argument in *Arnheim* was heard on January 16, 1973.

1. We adhere to the views expressed in our memorandum in response to the earlier petition in this case. Questions 2 and 3, involving whether the dollar volume requirements of Section 3(s) of the Act are to be based on gross rents or on commissions and whether petitioners are employers of the employees at the buildings, are not before the Court in *Arnheim* (Gov't Br. 13, n. 3), and involve no conflict in the circuits and do not otherwise warrant review by this Court. However, Question 1, the issue of the proper interpretation of the enterprise definition in Section 3(r), is before this Court in *Arnheim*. If this Court agrees with the Secretary's position in *Arnheim*, then it should deny cer-

tiorari in the present case. If, on the other hand, it affirms the judgment of the Third Circuit in *Arnheim*, we would not oppose a remand of the present case for redetermination of the enterprise issue in light of that decision.[1] Accordingly, we suggest that the Court hold the present petition for disposition in light of the *Arnheim* decision.

2. The remaining issue presented by the petition (Question 4) does not warrant review by this Court. There is no conflict among the circuits on the pre-judgment interest point. On the contrary, all of the courts of appeals which have considered the point have held that the award of pre-judgment interest is a proper exercise of the district court's equitable power in actions brought by the Secretary under Section 17 of the Fair Labor Standards Act to enjoin monetary violations of the Act and to restrain the withholding of back wages due to employees by reason of such violations. See *Hodgson* v. *Wheaton Glass Co.*, 446 F.2d 527, 534-535 (C.A. 3); *Hodgson* v. *American Can Company*, 440 F.2d 916, 921-922 (C.A. 8); *Hodgson* v. *Daisy Manufacturing Company*, 445 F.2d 823, 825 (C.A. 8); cf. *McClanahan* v. *Mathews*, 440 F.2d 320, 324-325 (C.A. 6).

This Court's decision in *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, is not to the contrary, as suggested by petitioners. In the first place, that case was not a Section 17 action; it was a Section 16(b) em-

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[1] We oppose an outright reversal here in the event *Arnheim* is affirmed, because the facts in the two cases are different in certain respects, and a decision adverse to the Secretary's position in *Arnheim* would not necessarily require the same result here.

ployee action for unpaid wages and liquidated damages (*i.e.*, double the amount of the unpaid wages). In the second place, the liquidated damages provision was at that time (1945) mandatory (see 324 U.S. at 710-711; cf. *McClanahan* v. *Mathews, supra,* 440 F.2d at 325), so that the interest question before the Court was "whether an employee recovering minimum wages and *liquidated damages* under the provisions of § 16(b) is *also* entitled to interest on the sums so recovered" (324 U.S. at 714; emphasis added). Although the Court denied interest, it expressly recognized that "interest is customarily allowed as compensation for delay in payment" and rested its action on the ground that "[t]o allow an employee to recover the basic statutory wage *and liquidated damages, with interest*" would tend "to produce the undesirable result of allowing *interest on interest*" (324 U.S. at 715; emphasis added).

Respectfully submitted.

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